

separate funding mechanism to support compliance with the additional requirements. Section 254(f) provides in pertinent part:

A State may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service. [. . .] A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. § 254(f) (emphasis added).

A State's adoption of additional universal service regulations may be further restrained by certain jurisdictional limitations. Specifically relevant to this case are the jurisdictional limitations set forth in Section 332(c)(3)(A) of the Act, which expressly prohibit State regulation of CMRS carrier rates and entry as follows:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services

47 U.S.C. § 332(c)(3)(A) (emphasis added).

C. The Federal Lifeline and Link Up Assistance Programs

The FCC has also established federal universal service mechanisms that provide public assistance to qualified, low-income consumers. These universal service mechanisms are known as the federal "Lifeline" and "Link Up" programs. The FCC regulations governing the Lifeline and Link Up programs are codified at 47 C.F.R., Part 54, Subpart E (47 C.F.R. §§ 54.400 through 54.417).

1. Eligibility Criteria

In Kansas, a consumer will be deemed eligible to receive federal Lifeline and/or Link Up assistance if the applicant's total household income is at or below 150% of the federal poverty guidelines or the applicant participates in any of the following public assistance programs:

Medicaid, Food Stamps, Supplemental Security Income (SSI), General Assistance, Temporary Assistance for Needy Families (TANF) or the National School Free Lunch program. 47 C.F.R. §54.409(a); *In the Matter of the Implementation of New Lifeline Service Program Eligibility Guidelines and Requirements*, KCC Docket No. 05-GIMT-1039-GIT, *Order Opening Docket and Establishing New Lifeline Service Program Eligibility Requirements and Guidelines* (May 19, 2005).² A resident of federally-recognized Tribal lands will be eligible for enhanced Lifeline and/or Link Up assistance if the applicant satisfies any of the forgoing criteria or participates in any of the following additional programs: Bureau of Indian Affairs General Assistance, tribally administered TANF or Head Start (based on income qualifying standards). 47 C.F.R. § 54.409(b).

2. Lifeline

The federal Lifeline program reimburses an ETC for providing qualified, low-income consumers a monthly discount off the cost of the carrier's lowest-cost residential rate plan. As set forth in the FCC's universal service rules, Lifeline is defined as "a retail local service offering: (1) [t]hat is available only to qualifying low-income consumers; (2) [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in [47 C.F.R. §] 54.403." 47 C.F.R. § 54.401(a) (emphasis added).

FCC Rule 54.403 defines both the amount of federal Lifeline support available and the limitations on the application of such support. Pursuant to 47 C.F.R. § 54.403, federal Lifeline

² In certain instances, the FCC's universal service regulations require a federal ETC to comply with State Lifeline/Link Up rules. These are limited to: State eligibility criteria (47 C.F.R. §§ 54.409(a) and 54.415(a)); State income certification procedures (47 C.F.R. § 54.410(a)(1)); State procedure to verify continued eligibility (47 C.F.R. § 54.410(c)(1)); State procedures for resolving disputes concerning eligibility and the termination of Lifeline assistance due to ineligibility (47 C.F.R. § 54.405(c)-(d)); and State recordkeeping requirements (47 C.F.R. § 54.417(a)).

support is comprised of four assistance credits or “Tiers.” “Tier One” support is equal to the monthly “tariffed rate in effect for the primary residential End User Common Line charge³ of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service.” “Tier Two” support is equal to \$1.75 per month. “Tier Three” support is equal to “one-half the amount of any state-mandated Lifeline support or Lifeline support otherwise provided by the carrier, up to a maximum of \$1.75 per month.” If applicable, “Tier Four” provides up to an additional \$25 per month for an eligible resident of Tribal lands, provided the additional support does not bring the basic local residential rate below \$1 per month.

Application of the federal Lifeline support credits to a qualifying customer’s basic residential rate is governed by 47 C.F.R. § 54.403(b), which provides in pertinent part:

Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer’s intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available)⁴ residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.

47 C.F.R. § 54.403(b) (emphasis added).

³ The “End User Common Line” charge is also referred to as the “Subscriber Line Charge” or “SLC.”

⁴ CMRS providers, like Sprint, do not provide service pursuant to utility tariffs, but rather enter into individual service contracts with subscribers. 47 C.F.R. § 20.15(c). Accordingly, CMRS providers are obligated under FCC Rule 54.403(b) to apply the Lifeline discount to their lowest cost “generally available” residential rate.

In adopting the regulations discussed above, the FCC clarified that a federal ETC must apply the federal Lifeline support it receives to the carrier's lowest generally available residential rate for the Supported Services:

These rules require that carriers offer qualified low-income consumers the services that must be included within Lifeline service, as discussed more fully below, including toll-limitation service. ILECs providing Lifeline service will be required to waive Lifeline customers' federal SLCs and, conditioned on state approval, to pass through to Lifeline consumers an additional \$1.75 in federal support. ILECs will then receive a corresponding amount of support from the new support mechanisms. Other eligible telecommunications carriers will receive, for each qualifying low income consumer served, support equal to the federal SLC cap for primary residential and single-line business connections, plus \$1.75 in additional federal support conditioned on state approval. The federal support amount must be passed through to the consumer in its entirety. In addition, all carriers providing Lifeline service will be reimbursed from the new universal service support mechanisms for their incremental cost of providing toll-limitation services to Lifeline customers who elect to receive them. The remaining services included in Lifeline must be provided to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services, or at the state's mandated Lifeline rate, if the state mandates such a rate for low-income consumers.

Universal Service Order, ¶ 368 (emphasis added).

Likewise, in formulating its initial universal service recommendations to the FCC in 1996, the Federal-State Joint Board on Universal Service (the "Joint Board") determined that the "Lifeline rate" to be made available to qualified, low-income consumers shall be "the carrier's lowest comparable non-Lifeline rate reduced by at least the \$5.25 [now \$8.25] amount of federal support." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Recommended Decision*, FCC 96J-3, 12 FCC Rcd. 87, 61 FR 63778, ¶ 424 (rel. Nov. 8, 1996) ("Joint Board Recommended Decision").

3. Link Up

The federal Link Up program reimburses ETCs for providing discounted service activation or installation charges to qualified, low-income consumers. Consumers qualifying for

Link Up assistance are eligible to save up to 50% of the first \$60 of the ETC's customary service activation or installation charges (*i.e.*, the subscriber will receive a 50% discount or \$30.00, whichever is less). Qualified, low-income consumers residing on federally-recognized Tribal lands may receive an additional \$70 to defray 100% of the service activation or installation charges between \$60 and \$130. Eligible consumers may also establish an interest-free 12-month deferred payment plan for the remaining activation or installation charges of up to \$200.

D. Sprint's Lifeline Service Offering

In Kansas, Sprint's Lifeline service offering is based on the Company's lowest cost \$29.99 base rate plan, which includes 200 Anytime Minutes and unlimited Night and Weekend Minutes. The calling area for Sprint's Lifeline service offering is national, so Lifeline customers may make outgoing long distance calls without incurring an additional charge. In addition to the FCC-defined Supported Services, Sprint's Lifeline service offering also includes the following enhanced services at no charge to the customer: voice mail, call waiting, caller ID, numeric paging and three-way calling. After applying the total \$13.50⁵ federal Lifeline discount, Sprint customers pay only \$16.49 per month for Lifeline service.

E. The Kansas Lifeline Rule

In October 2005, the KCC commenced an administrative rulemaking proceeding (Docket No. 06-GIMT-446-GIT) to review the adoption of certain additional regulations and

⁵ To enable Lifeline customers in Kansas to receive the full \$13.50 discount, Sprint voluntarily reduces its rate by \$3.50. These "carrier-matching funds" ensure that the Lifeline subscriber will receive \$1.75 in federal Tier 3 matching support. *See* 47 C.F.R. § 54.409(c) ("[Q]ualifying low-income consumer shall also qualify for Tier-Three Lifeline support, if the carrier offering the Lifeline service is not subject to the regulation of the state and provides carrier-matching funds . . .")

requirements applicable to carriers designated as federal ETCs in Kansas. On October 2, 2006, the KCC released an Order⁶ adopting the following requirement:

ETCs are required to allow Lifeline customers to choose a calling plan and to apply the Lifeline discount to the plan selected by the customer. Any ETC that does not allow customer selection at this time must do so within 180 days [*i.e.*, by March 31, 2007] of the date of this Order.

In other words, the KCC directed all ETCs to apply the federal Lifeline discounts to any calling plan selected by the consumer, rather than a carrier's lowest cost residential rate plan as expressly required by 47 C.F.R. § 54.403(b).

III. ARGUMENT

The Kansas Lifeline Rule violates federal law and must be enjoined for the following three reasons:

1. The Kansas Lifeline Rule is inconsistent and cannot be reconciled with the FCC's universal service rules in violation of 47 U.S.C. § 254(f);
2. Compliance with the Kansas Lifeline Rule would require a federal ETC to inappropriately apply federal low-income universal support to reduce the cost of any rate plan selected by the consumer, rather than the carrier's lowest cost residential rate plan as expressly required by 47 C.F.R. § 54.403(b); and
3. Compliance with the Kansas Lifeline Rule would require Sprint to provide an equivalent monthly Lifeline service discount (*i.e.*, \$13.50) on any rate plan without the ability to recover the discount from the federal universal service support fund. As a result, the Rule would unlawfully regulate Sprint's rates in violation of 47 U.S.C. § 332(c)(3)(A).

⁶ Copies of the Order and the subsequent Order denying motions for reconsideration, are attached as exhibits 1 and 2.

A. Temporary Restraining Order/Preliminary Injunction Standard

The Court is vested with broad discretion in determining whether preliminary injunctive relief should be granted. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). Pursuant to Federal Rule of Civil Procedure 65, the Court may issue a temporary restraining order and/or preliminary injunction to maintain the *status quo* pending a final determination on the merits. *Tri-State Generation & Transmission Ass'n., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). A party seeking preliminary injunctive relief must generally demonstrate the following: (1) irreparable harm unless the injunction issues; (2) the threatened injury to the moving party outweighs any damage to the opposing party; (3) the injunction, if issued, will not be adverse to the public interest; and (4) a substantial likelihood of success on the merits. See *Tri-State*, 805 F.2d at 355; *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). If the moving party satisfies the first three elements, the standard for meeting the fourth requirement, likelihood of success on the merits, generally becomes more lenient and the moving party “need only show that the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation.” *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1221 (10th Cir. 2003); *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1231 (D. Kan. 2002), *aff'd*, 341 F.3d 1202.

B. Each Of The Criteria Warranting Preliminary Injunctive Relief Is Decisively Satisfied In This Case

1. Sprint Will Suffer Irreparable Harm If Enforcement Of The Kansas Lifeline Rule Is Not Enjoined

Sprint will suffer irreparable harm if the Kansas Lifeline Rule is enforced. As set forth above, compliance with the Kansas Lifeline Rule would require Sprint to inappropriately apply federal low-income universal support to reduce the cost of any calling plan selected by a Lifeline

customer, rather than Sprint's lowest cost generally available residential rate plan as required by 47 C.F.R. § 54.403(b). FCC Rule 54.403(b) expressly requires "other" ETCs (meaning a competitive ETC, like Sprint, that does not include the SLC charge as a component of its rate) to only apply federal Lifeline support to the carrier's lowest cost residential rate plan that includes the essential Supported Services:

Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.

47 C.F.R. § 54.403(b) (emphasis added). "Shall," in this case, is mandatory. *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997) ("It is a basic canon of statutory construction that use of the word 'shall' indicates mandatory intent."), *cert. denied*, 117 S.Ct. 2446 (1997).

FCC Rule 54.403(b) is unambiguous, but even if it were, the FCC clearly stated its intention to only apply the Lifeline discount to an ETC's lowest cost residential rate plan:

The remaining services [*i.e.*, the Supported Services other than Toll Limitation] included in Lifeline must be provided to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services, or at the state's mandated Lifeline rate, if the state mandates such a rate for low-income consumers.

Universal Service Order, ¶ 368 (emphasis added). Indeed, in so doing, the FCC relied on the Joint Board recommendation that the "Lifeline rate" must be "the carrier's lowest comparable non-Lifeline rate reduced by at least the \$5.25 [now \$8.25] amount of federal support." *Joint Board Recommended Decision*, ¶ 424 (emphasis added).

Accordingly, because the Kansas Lifeline Rule would improperly require Sprint to apply federal Lifeline support to reduce the cost of any calling plan, rather than Sprint's lowest cost generally available residential rate plan, Sprint would be required to violate 47 C.F.R.

§ 54.403(b) to comply with the new State law requirement. Sprint cannot be forced to choose between compliance with State or federal law without suffering irreparable harm.

2. The Balance Of Harms Clearly Favors Sprint

For similar reasons, the balance of harms clearly favors Sprint. If enforcement of the Kansas Lifeline Rule is not enjoined, Sprint will be required to violate federal law in order to comply with the State law requirement. If enforcement of the Kansas Lifeline Rule is enjoined, however, it would simply maintain the *status quo*. Sprint will still be able to provide eligible consumers federal Lifeline assistance, and those customers will still be able to subscribe to Sprint's Lifeline service offering pending the Court's final decision on the merits.

3. Injunctive Relief Will Promote, Not Harm, The Public Interest

Enjoining the enforcement of the Kansas Lifeline Rule will also promote the public interest. If the Kansas Lifeline Rule is not enjoined pending a final decision of this Court, Lifeline customers that subscribe to a non-compliant rate plan may ultimately be disqualified from receiving federal Lifeline assistance for that plan. At the very least, this result would create unnecessary consumer confusion or, worse, could result in the mandatory disgorgement and restitution of program benefits.

4. Sprint Will Undoubtedly Prevail

Enforcement of the Kansas Lifeline Rule should also be enjoined because Sprint is likely to prevail on the merits. Because the Kansas Lifeline Rule cannot be reconciled with 47 C.F.R. § 54.403(b), the KCC had no authority to adopt the requirement under federal law. As discussed above, a State commission's authority to adopt additional universal service requirements is circumscribed by 47 U.S.C. § 254(f), which prohibits the adoption of any State requirement that is inconsistent with the FCC's universal service rules. 47 U.S.C. § 254(f) ("A State may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service.")

(emphasis added). The limited authority delegated under section 254(f) is permissive. If a State commission adopts a regulation that is consistent with the FCC's rules, it may be enforced. However, if the State requirement is inconsistent with the FCC's rules – like the Kansas Lifeline Rule in this case – the State requirement is preempted and unenforceable under federal law.

Sprint is also likely to prevail because the Kansas Lifeline Rule would unlawfully regulate its rates in violation of 47 U.S.C. § 332(c)(3)(A). Compliance with the Kansas Lifeline Rule would require Sprint to provide an equivalent monthly service discount (*i.e.*, \$13.50) to qualified, low-income consumers that subscribe to any of its service offerings, not just Sprint's lowest cost Lifeline service offering. Yet, FCC Rule 54.403(b) would prohibit Sprint from receiving federal Lifeline universal service support to reimburse the Company for providing such discounts. In other words, the Kansas Lifeline Rule is an unfunded mandate that will require Sprint to discount its rates for a particular class of end-users without compensation. This is rate regulation in its purest form.

As a CMRS provider, Sprint's rates are specifically exempt from State regulation. Section 332(c)(3)(A) of the Act prohibits any State action which would effectively regulate the rates charged by a CMRS provider:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services

47 U.S.C. § 332(c)(3)(A) (emphasis added). Although a State may petition the FCC, pursuant to 47 C.F.R. § 20.13, for an exemption from section 332(c)(3)(A), the KCC has never done so. The KCC's inaction is fatal. *See WWC Holding Co. v. Sopkin*, 420 F.Supp.2d 1186, 1193-94 (D. Colo. 2006), *appeal pending* (A CMRS provider's status as a federal ETC did not authorize

the State regulatory commission to regulate the carrier's rates. The State commission must first petition the FCC for regulatory authority under 47 U.S.C. § 332(c)(3)(A) and 47 C.F.R. § 20.13).

Accordingly, because the KCC had no authority to adopt the Kansas Lifeline Rule, and because the Rule would effectively regulate Sprint's rates in violation of section 332(c)(3)(A), enforcement of the Rule should be enjoined as Sprint is likely to prevail on the merits.

IV. CONCLUSION

For the forgoing reasons, the Court should preliminarily enjoin the enforcement of the Kansas Lifeline Rule pending a determination on the merits concerning its inconsistency with and violation of federal law.

Dated: March 23, 2007.

Respectfully submitted,

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ATTACHMENT 8

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ORDER. Pursuant to the parties' stipulation [29], the Court refers this matter to the Federal Communications Commission ("FCC") under the primary jurisdiction doctrine. All matters in the case are hereby stayed pending a decision by the FCC. In light of this ruling, defendants' motion to dismiss [#25] and defendants' motion for leave [27] are hereby overruled without prejudice. The Clerk is directed to close the case administratively. Signed by Judge Kathryn H. Vratil on 5/8/07.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.)(ls)

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